U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 17 May 2006

BALCA Case No.: 2005-INA-28
ETA Case No.: P2002-CA-09535510/JS

In the Matter of:

RINCON TAPATIO,
Employer,

on behalf of

NORMA LETICIA VEGA,
Alien.

Certifying Officer: Martin Rios[1]
San Francisco, California

Appearance: Maurico Arzate, Owner, El Monte, California[2]
Pro Se for the Employer

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and

[1] Mr. Rios was the Certifying Officer who denied the application. The Employment and Training Administration subsequently transferred responsibility over applications filed in San Francisco prior to the effective date of the "PERM" regulations to its Dallas Backlog Processing Center.

[2] Although "Ruben R. Gomez, J.D." signed the Application for Alien Employment Certification as Employer's Agent (AF 20-21) and submitted the rebuttal under his cover letter (AF 6), the Request for Review was filed by Maurico Arzate (AF 1-2). Moreover, Mr. Arzate also signed the Application for Alien Employment Certification (AF 20-21), and provided Employer's rebuttal information (AF 7-9).

Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").[3] Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On April 4, 2001, the Employer, Rincon Tapatio, filed an application for labor certification to enable the Alien, Norma Vega, to fill the position of "COOK/MEXICAN," which was classified by the Job Service as "Cook, Restaurant" (AF 20). The ETA 750A application listed the following job duties for the position:

> Responsible for the complete preparation, cooking and seasoning of all menu items and daily specials. Prepares all soups, sauces, salads, meats, vegetables, desserts, etc., based on established recipes. Observes and tests during cooking. Seasons according to personal judgment and experience with the cuisine. Portions, garnishes and serves to order. Does inventory and ordering based on consumption.
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> Restaurant Hours: 8:00 am – 10 pm
> Seating Capacity: 45 persons
> Average Daily Patronage: 160 persons

(AF 20, Item 13). The only requirement stated for the job was two years of experience in the job offered (AF 20, Item 14).

In a Notice of Findings ("NOF") issued on April 9, 2004, the CO proposed to deny certification on the grounds that the Employer had rejected a seemingly qualified U.S. applicant for other than lawful job-related reasons. *See* 20 C.F.R. §656.21(b)(6). (AF 16-18). The Employer submitted its rebuttal on May 4, 2004 (AF 6-15). The CO found the rebuttal

[3] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004).

unpersuasive and issued a Final Determination, dated May 20, 2004, denying certification (AF 3-5). On or about June 16, 2004, the Employer appealed the Final Determination (AF 1-2). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals.

DISCUSSION

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. §656.21(b)(6). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good faith requirement is implicit. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988) (en banc); *Tilden Car Care Center*, 1995-INA-88 (Jan. 27, 1997). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. §656.1.

In the present case, one U.S. applicant responded to Employer's recruitment efforts. His resume reveals that, after completing a two-year culinary program at UCLA, he worked in various cooking-related positions including Sous Chef, Prep. Chef, and Lead Line Cook, for approximately six years (AF 30).

In the NOF (AF 16-18), the CO found that the Employer had unlawfully rejected the applicant. After citing the applicant's qualifications, the CO stated, in pertinent part:

> His experience may include the equivalent of about two years in Mexican cuisine. The employer sent a letter to him, without referencing the job to which he had applied, and stated that he was to contact the employer by October 7 and bring proof of eligibility to work in the United States at the time of interview. First, the employer's letter may have been discouraging because the applicant would not have been able to identity [sic] the job as the advertised position at hand to which he had applied. Next, it is not legal in California to require proof of authorization

> to work at the time of interview; an employer may only request such authorization when the job is being offered. Finally, the employer shows by a copy of the certified mail receipt that the letter was mailed on September 25, 2002, but there is no return receipt provided [to] show when or if the applicant received the employer's letter. Thus it is uncertain as to whether the applicant received the letter in sufficient time to have replied before October 7. For all of these reasons, it does not appear that the employer made a good faith attempt to recruit this applicant. At the same time the employer has also not shown him to be less than qualified. Therefore, we find that the employer has failed to show that he was rejected for job-related reasons.
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> Corrective action:
>
> Submit rebuttal which documents the U.S. worker named above was recruited in good faith during the recruitment period and has been rejected solely for lawful, job-related reasons.

(AF 17).

The Employer's rebuttal consists of a letter by its Owner, Maurico Arzate, dated May 3, 2004 (AF 7-9). Initially, Mr. Arzate stated that, based solely on the resume of the only U.S. applicant, he does not meet the minimum stated requirements, because his resume does not establish any experience in Mexican cuisine. Therefore, the allegations that Employer "attempted in some way to discourage an unqualified applicant have no bearing on this application." Secondly, Mr. Arzate stated that he provided a copy of the advertisement together with his letter to the U.S. applicant, and therefore the applicant would have been able to identify the position for which he was being considered. Third, Employer asserted that he merely *suggested* that the applicant bring proof of his ability to work legally in the United States, on the assumption that, if the applicant was qualified, Mr. Arzate would offer him the position at the time of the interview. Furthermore, Mr. Arzate reiterated that his attempt to contact the U.S. applicant was "above and beyond the required scope of this application," and based on "wishful thinking" that the U.S. applicant might have experience in Mexican cuisine not specified on his resume. Accordingly, Mr. Arzate stated: "Instead of being congratulated for my extra efforts, this application has been subjected to additional uncalled-for scrutiny and criticism." In conclusion, Mr. Arzate stated that the U.S. applicant does not meet the minimum stated job requirements, and that Employer did not "discourage" the U.S. applicant (AF 7-9).

In the Final Determination, the CO found Employer's rebuttal to be unpersuasive. While noting that he could not verify Employer's statement that the advertisement was included with the letter to the U.S. applicant, the CO stated that, even if this issue was disregarded, he still could not find that Employer had made a sufficient effort to recruit the applicant. In making this determination, the CO stated, in pertinent part:

> Issues discussed in the Notice of Findings included how the employer's letter appeared discouraging, if the applicant received [it], and also the lack of a certified return receipt showing if or when the applicant received the letter. It remains that employers may not require proof of the legal right to work at the time of the interview, and the employer's contact letter shows that he did require that; the employer's letter was not worded in the manner of a mere suggestion.
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> We find that it was reasonable to consider that the applicant may be qualified because of the extent of the applicant's culinary experience. The employer had stated in his recruitment report dated October 31, 2002, that the applicant's resume looked promising. Whereas the applicant failed to reference any ethnic cuisine on his resume, it was prudent of the employer to attempt to contact the applicant to further investigate whether and/or to what extent his experience may include Mexican style cuisine. We do not agree that any attempt to contact such an experienced cook should be considered an extra effort. The employer was in fact required to document if the applicant was not qualified.
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> In addition to the discouraging requirement to show proof of the right to work at the time of the interview, it remains that we have no record of whether or when the applicant received the employer's letter. Thus, we do not know if the letter was received in sufficient time for the applicant to have responded by October 7. This is significant, because the letter indicated that he would only be considered if he replied by that date.
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> Based on review of the employer's rebuttal, we do not find that the employer has met its burden of documenting that there was a job related reason for the rejection of the applicant .... For this reason, the application for labor certification is denied.

(AF 4-5). We agree.

The Board has consistently held that where a U.S. applicant's resume indicates a reasonable possibility that he/she meets the stated job requirement, an employer is obligated to further investigate such applicant's credentials, by interview or otherwise. Accordingly, in such

case, an Employer may not summarily reject a seemingly qualified U.S. applicant based on the resume alone. *Gorchev and. Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990)(en banc); *Hambrecht Terrel International*, 1990-INA-358 (Dec. 11, 1991); *Dearborn Public Schools*, 1991-INA-222 (Dec. 7, 1993)(en banc); *Pico Investment Company*, 1994-INA-249 (Oct. 4, 1995); *A.A. Curbing, Inc.*, 1995-INA-427 (July 16, 1997).

As set forth above, the U.S. applicant has extensive cooking experience (AF 30). Furthermore, in its report of recruitment results, Employer acknowledged that the applicant's "resume looked promising as evidenced by the stated experience." (AF 25). Accordingly, Employer was obligated to further investigate his credentials, and it was appropriate for Employer to contact the applicant. Although the record indicates that Employer apparently sent a letter, dated September 24, 2002, to the U.S. applicant, there is no proof when (or even if) the letter was received by the applicant.[4]

It is well settled that an employer has the burden to substantiate its assertion that it made contact promptly with potentially qualified U.S. applicants. *See, e.g., Flamingo Electroplating, Inc.,* 1990-INA-495 (Dec. 23, 1991); *Venk Jewelry,* 1989-INA-348 (July 30, 1990); *Harvey Studios,* 1988-INA-430 (Oct. 25, 1989). Based upon the facts of this case, in which the signed returned receipt has not been produced, we find that Employer has failed to meet its burden.

We also note that, contrary to Employer's assertion, the clear language of Employer's letter indicates that the applicant was *required* to show proof that he was a legal resident in the United States at the time of the interview (AF 27). As stated by the CO, such language is improper and may discourage a qualified U.S. applicant from pursuing the position. This Board has ruled that the requirement that an employer verify authorization to work in the United States pursuant to 8 U.S.C. § 1324a cannot be used as a means during recruitment in a labor certification application to discourage applicants. *See Star Dollars*, 1997-INA-219 (May 13, 1999); *Polysindo (USA), Inc.*, 1995-INA-03 (Sept. 30, 1997)(employer not required to verify

[4] In its Request for Review, Employer stated that it had sent the letter to the U.S. applicant by certified mail, return receipt requested, but that "the returned green receipt which the applicant signed when he received my certified letter" had been "somehow misplaced in the year and a half wait for processing of this recruitment." (AF 2).

immigration status until actual good faith recruitment); *Percy Solotoy*, 1992-INA-331 (Nov. 9, 1993). *See also Collins Foods Int'l, Inc. v. U.S.I.N.S.*, 948 F.2d 549 (9th Cir. 1991); 8 CFR section 274a2 (verification not required until time of hire).

In view of the foregoing, we find that the Employer failed to document that it rejected the U.S. applicant solely for lawful job-rejected reasons. Accordingly, we find that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of

the petition the Board may order briefs.